IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No. 335 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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GHANSHYAMBHAI K SATHWARA -SUCCESSOR IN INTEREST OF & 12 -Applicant(s)

Versus

SONUBHAI BALIRAM PATIL & 2 - Opponent(s)

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Appearance :

MR NILESH M SHAH for Applicant(s) : 1 - 13.
MR HN BRAHMBHATT for Opponent(s) : 1,
RULE SERVED for Opponent(s) : 2.2.1,2.2.2 - 3.

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CORAM : HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

Date : 19/12/2005

ORAL JUDGMENT

As many as 13 petitioners are before this Court, who are the original objectors in Regular Darkhast Application No.213 of 2002 filed in the Court of the learned Joint Civil Judge (Junior Division), Vadodara, who was pleased to grant the same and was also pleased to

reject the application filed by defendant no.2-Harshadbhai Shantilal Shah, by order dated 10.10.2003. The present petitioners had filed their objections by exh.21.

2. Short facts leading to the present litigation are that the judgement creditor-respondent no.1 herein had filed Regular Civil Suit No.1209 of 1985 against two defendants. One Shankar Rao Laxmanrao Shelar, who died on 29.10.1986, hence his heirs are joined as 1/1 and 1/ 2 in Darkhast Application. The said Regular Civil Suit No.1209 of 1985 was decreed on 19.09.1986. The judgement and order passed by the learned 2nd Joint Civil Judge (Junior Division), Vadodara is produced at page 42 to this Civil Revision Application, whereas the decree is produced at page 43. The material part is at page 45. It is mentioned at page 46 that it was agreed between the plaintiff and defendant no.1 (of Regular Civil Suit No.1209 of 1985) that defendant no.1 will execute a sale deed of the land mentioned in the 'agreement to sell'; that no amount of consideration is due and payable by the plaintiff to the defendant; that on the land in question there are 14 vacant houses, possession of which is handed over to the plaintiff. It is further mentioned that

possession of one of the 14 houses, was handed over to the defendants on ownership basis and it was agreed that after the life time of defendant no.1 the same will go to his son-Gajanan Shankar Rao Shelar and Ashaben Shankar Rao by inheritance. It is also mentioned that with regard to the suit land if any member comes forward and claims that the amount is not paid to him, it will be the responsibility of the plaintiff to pay the same.

It so happened that after the said decree was passed on 19.09.1986, defendant no.2 filed a Regular Civil Suit No.1961 of 1986 and other objectors no.3 to 15 filed Special Civil Suit No.669 of 1986. It is on record that Regular Civil Suit No.1961 of 1986 was dismissed for non prosecution on 20.03.2001. Thereafter, the plaintiff in that suit filed Civil Misc. application No.133 of 2001 for restoration of the same.

3. The learned advocate appearing for the petitioners contended that the decree in question has remained 'not executable' on expiry of the period of 12 years on 18.09.1998. He submitted that the present Darkhast is filed on 19.08.2002 and therefore, the learned Judge ought to have dismissed the same in limine without even

examining the contents of the execution application. He submitted that it is not in dispute that Regular Civil Suit No.1209 of 1985 was decreed on 19.09.1986 and 12 years have expired on 18.09.1996, and on expiry of 12 years the decree became non executable and hence the execution application should have been dismissed only on that short ground.

4. This very contention was raised on behalf of the objectors before the executing court and the learned Judge has taken all pains to consider the rival submissions. The learned Judge has recorded that soon after the decree was passed on 19.09.1986, Special Civil Suit No.669 of 1986 was filed which is pending as on date. Defendant no.2 had filed Regular Civil Suit No.1961 of 1986 which as mentioned hereinabove was dismissed for non prosecution for absence of the plaintiff of that suit on 20.03.2001. The learned Judge has further recorded that it was on account of pendency of Regular Civil Suit NO.1961 of 1986 that the judgement creditor did not file Darkhast and it was filed on 19th August 2002, after the suit (Regular Civil Suit No.1961 of 1986) was dismissed.

5. The learned advocate appearing for the petitioners also contended that the decree was obtained by fraud, and therefore, the same is vitiated and cannot be enforced. He submitted that initially Regular Civil Suit No.1209 of 1985 was filed against two defendants, but later on defendant no.2 was deleted and the suit was compromised with defendant no.1.

All these grounds were available to the party to challenge the decree well in time, when the party knew about the decree. Putting up this contention in this Civil Revision Application after having lost before the executing court, is of no consequence and the contention is found without any substance and merit.

In the decree it is specifically mentioned as to why defendant no.2 was deleted. It is mentioned in para 4 that defendant no.2 was found to be a formal party as defendant no.1 who had given certain authority to defendant no.2, had withdrawn the same and therefore, the plaintiff (of Regular Civil Suit No.1209 of 1985) had no relief to claim against defendant no.2 and therefore, he was deleted. Only because defendant no.2 was deleted, decree does not become a decree obtained by fraud. In

any case, fraud is a mixed question of law and fact and it is to be agitated in detail and proved before the Court by leading necessary evidence. Casual contention in Civil Revision Application against an order passed by an executing court is a contention taken only for the sake of taking, half-heartedly and that does not impress this Court and hence the same is rejected.

The learned advocate appearing for the petitioner repeatedly contended that decree is a 'stale' decree and the same is not executable after the expiry of period of limitation, which as prescribed under Article 136 of the Limitation Act is 12 years. He submitted that if at all the judgement-creditor wanted to get decree executed he should have filed Darkhast Application before 18.09.1988.

The learned advocate for the petitioners also contended that the decree which is sought to be executed is not the decree obtained against the present petitioners and hence it is not executable. His contention is that the present petitioners were also necessary party in the suit.

As the facts stand, Regular Civil Suit No.1209 of 1985 was filed against two defendants. One Shankar Rao and

another the organiser of Jalaram Nagar Society-Harshad Shantilal Shah. The said suit came to be compromised between the plaintiff of that suit, and defendant no.1, after deleting defendant no.2 from that suit. It is specifically mentioned in the decree that, 'possession of 14 constructed houses is handed over to the plaintiff and in consideration thereof, possession of one constructed house is given to defendant no.1'. that being so there is no reason why the present petitioners be joined as party respondents. Even if it is believed for the sake of argument that the present petitioners had any interest, they are already before the Court by filing Special Civil Suit No.669 of 1986.

The learned advocate also submitted that the judgement creditor is taking two pleas for contending that decree is executable, he says that there was Regular Civil Suit No.1961 of 1986 pending. If that is so, then even today the said suit is pending as Civil Misc. Application No.133 of 2001 filed for restoration of the said suit is pending. He also submitted that Special Civil Suit No.669 of 1986 is also pending as on date. Therefore, he could not have filed execution application for decree dated 19.09.1986.

This submission of the learned advocate is found without any merits for the simple reason that the judgement-creditor having waited for such long, on dismissal of the suit (Regular Civil Suit No.1961 of 1986) filed execution application and the same is entertained by the learned Judge of the executing court. This Court finds no error having been committed by the Court. This Court finds that the learned Judge has not committed any error in exercising jurisdiction vested in it and therefore, this contention is rejected.

6. The learned advocate for the petitioners contended that the decree is obtained by fraud. The contention to this effect, cannot be entertained in Revision Application because the scope of Revision Application does not permit. This contention too cannot be allowed to be raised in this Civil Revision Application in light of the fact that these very objectors have filed Special Civil Suit No.669 of 1986 and all these pleas, could have been taken there. The learned advocate does not point out as to whether these pleas are taken in Special Civil Suit No.669 of 1986. The learned advocate appearing for the petitioners is not able to assist the Court by

throwing any light on the facts as to whether this contention is raised in Regular Civil Suit No.1961 of 1998 or not. Therefore, this contention is also rejected.

7. The learned advocate for the petitioners next contended that in Special Civil Suit No.669 of 1986 an injunction is granted and that injunction is operating till date. In this regard the learned advocate invited attention of this Court to exh.5 application, filed in Special Civil Suit No.669 of 1986 on 29.11.1986. There is para 6, subpara (1) it is prayed that respondents no.2, 3 & 4 be restrained from executing sale deed of Blocks No.1 to 7 and 28 to 34 in favour of anybody else than the applicants who are the holders of those blocks. It is also prayed in the same para that the respondents be restrained from transferring the said blocks either by sale, mortgage, gift or any other mode till final disposal of the suit.

In para 6(2) of the said application it is prayed that respondents no.1, 2 and 3 be restrained from illegally entering the block/ house nos.1 to 7 and 28 to 34 and the possession of the applicants be not disturbed.

8. It is interesting to note that Special Civil Suit No.669 of 1986 is filed by one single plaintiff, namely, Urmilaben Bhupendrabhai Mistry. She could not have prayed for the relief covering all the blocks together, i.e. from Blocks no.1 to 7 and 28 to 34. She at the most could have prayed for protecting the possession of the block, which according to her is in her possession.

9. The learned advocate appearing for the petitioners placed reliance on the decision of the Hon'ble the Apex Court in the matter of **West Bengal Essential Commodities Supply Corporation Vs. Swadesh Agro farming and Storage Pvt. Ltd. and another**, reported in A.I.R. 1999 SC 3421. The learned advocate submitted that as held by the Hon'ble the Apex Court in the aforesaid decision, starting point for reckoning the limitation is the date of decree and not the date on which decree is actually drawn and signed.

This is not the point in controversy in the present case. Hence the aforesaid decision has no application to the facts of the present case.

10. The learned advocate next relied upon a decision of the Hon'ble the Apex Court in the matter of **Antonysami Vs. Arulanandam Pillai (D) by LRs and another,** reported in A.I.R. 2001 SC 2967. The learned advocate could not point out as to how the said decision of the Hon'ble the Apex Court is applicable to the facts of the present case. In the case before the Hon'ble the Apex Court, Article 136 of the Limitation Act was under consideration and the Hon'ble the Apex Court was pleased to observe in para 16 as under”

> “The fixation of periods of limitation are bound to be to some extent arbitrary and may at times result in hardship. But in construing such provisions equitable considerations are out of place and the strict grammatical, meaning of the words is the only safe guide. (See AIR 1932 PC 165). The decree was enforceable immediately after the date specified in the decree i.e. 23.9.1966 for the decree-holder to deposit the consideration money. If the direction given in the decree to the judgment-debtor to measure and demarcate the land by that date (23.9.1966) was not complied with the decree-holder was free to

execute the decree. The steps to be taken by the decree-holder in this regard are provided in O.21, R.34(1), C.P.C.”

11. In the present case, there is no such direction given to either judgement-creditor or judgement-debtor and therefore, this judgement is not applicable to the facts of the present case.

12. In the present case the facts are simple. A consent decree was drawn on 19.09.1986. Thereafter, the present petitioners being objectors no.3 to 15 approached the Court by filing Special Civil Suit No.669 of 1986, whereas respondent no.3 herein-original defendant-judgement debtor no.2 had filed Regular Civil Suit No.1961 of 1996. That suit was dismissed for non prosecution on 20.03.2001. It is thereafter that the present Darkhast is filed on 19.08.2002. The learned Judge of the executing court has rightly found that the Darkhast is filed within the period of limitation. This Court finds no error in the said conclusion of the learned Judge of the executing court. Hence this Revision Application must fail.

13.The learned advocate, Mr.Brahmbhatt appearing for respondent no.1 herein submitted that this is a case of abuse of process of law. He submitted that firstly the present petitioners and respondent no.3 herein tried to deprive the present respondent no.1-judgement creditor of the fruits of the decree which was passed as back as on 19.09.1986 by filing frivolous litigation. He submitted that he is branding the litigation filed by the petitioners and respondent no.3 as frivolous because the parties have deliberately not pursued the litigation to a logical end. The petitioners herein have not taken any care to learn about the development of Special Civil Suit No.669 of 1986. Similarly, respondent no.3 has allowed his suit to be dismissed in the year 2001. Later Civil Misc. Application NO.133 of 2001 is filed, but then the same is also not pursued sincerely, as expected of a party who has genuine interest in the litigation. The learned advocate for respondent no.1 submitted that the petitioners as well as respondent no.3 are out to see that the judgement creditor is deprived of the fruits of his decree. Therefore, the learned Judge of the executing court has rightly allowed Darkhast

Application and rejected exh.14 application.

The learned advocate for respondent no.1 submitted that the present revision application has no merit inasmuch as the petitioners are not able to point out any error of exercise of jurisdiction, not vested in the learned Judge or of having failed to exercise jurisdiction so vested in him and/ or any material irregularity in exercising the jurisdiction vested in the learned Judge and therefore, the revision application deserves to be dismissed and the same be dismissed with cost which will give some solace to the judgement creditor, who is yet to see the fruits of the decree passed in his favour in the year 1986.

14. Having heard the learned advocates, having perused the record of the case, this Court finds that there is no error committed by the learned Judge in passing order dated 10.10.2003. This Civil Revision Application is dismissed.

15. The Court refrains itself from passing an order of cost in favour of the judgement creditor only because normally the party acts on the advice given by the learned advocate.

16. At this stage the learned advocate for the petitioners submitted that the learned 3rd Joint Civil Judge (Senior Division), Vadodara by order dated 16.07.1988 passed below Exh.5 in Special Civil Suit No.669 of 1986 has protected possession of the petitioners. He invited attention of the Court to the order which is produced at Annexure 'G' to this Revision Application.

Annexure 'G' is a copy of the application filed by the plaintiff of Special Civil Suit No.669 of 1986 under section 151 and Order XXXIX, Rules 1 & 2 of the Code of Civil Procedure. Para 13 of the order which is produced, reads as under:

> “.. .. But, it is an admitted fact that **plaintiff and other members of the society who were in possession of their respective houses in said land were not the parties and therefore, the compromise entered into between the parties of that case will certainly cannot be binding and effective to the plaintiff**. Apart from this fact, all these matters which can be decided

only after the parties lead their respective evidence in support of their case but, prima facie **since the plaintiff is proved to be in possession of her suit houses her possession must be protected and therefore, in my opinion balance of convenience also lies in her favour**. I, therefore, for the reason stated above, decide points no.1 and 2 in affirmative. Hence, I pass the following order. (emphasis supplied)

Ad interim injunction granted in favour of the plaintiff is hereby confirmed till final hearing and disposal of the suit.

The costs for this application shall be the costs in cause. Pronounced and signed in open Court today, dated 16.07.1988."

The learned advocate for the petitioners has not produced the order passed by the learned Judge at an initial stage. Therefore, it is not possible for this Court to appreciate as to in what terms the ad interim injunction was granted in favour of the plaintiff which is

confirmed by the aforesaid order.

In any case Special Civil Suit No.669 of 1986 is filed only by one single person and therefore, protection, if any, can be granted only in favour of the plaintiff and cannot be granted in favour of all other members of the society as the learned Judge has observed in earlier part of the order.

17. As this Court is not called upon to examine the legality and validity of the order passed by the learned 3rd Joint Civil Judge (Senior Division), Vadodara dated 16th July 1988, therefore, this Court does not comment upon the same. However, it is clarified that the observations made hereinabove are 'prima facie observations'. In case there is any injunction order operative in favour of any party granted by a competent court, the same remains to be operative until it is vacated by a higher court of competent jurisdiction. This Court has vacated the interim relief granted by this Court on 17.11.2003. That does not automatically vacate any other injunction operative, if any, in favour of any party. Direct service is permitted.

18. At this stage, the learned advocate for the petitioners prayed for extension of the interim relief which was granted by this Court on 17th November 2003 by way of ad interim relief and was confirmed by order dated 15th March 2004.

Having found no merit in the matter, the request for extension of interim relief is rejected.

(RAVI R. TRIPATHI, J.)

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